BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL F. BRYAN Claimant VS. **CARDINAL HEALTH, INC.** Respondent AND **XL SPECIALTY INSURANCE CO.** Insurance Carrier	)	Docket No. 1,035,186

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 15, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Heather A. Howard, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that it was probably more true than not true that claimant suffered injury that arose out of and in the course of his employment and that timely notice was proved by claimant to respondent. The ALJ found that claimant was in need of medical care and ordered respondent to provide claimant with a list of three physicians from which claimant can select one for authorized medical treatment. The ALJ also found that claimant shall be entitled to temporary total disability compensation if he is taken off work by the authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 14, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent denies that claimant sustained an accident that arose out of and in the course of his employment. Respondent also argues that claimant alleged a specific

accident in his testimony but is attempting to create a claim for a series of repetitive traumas to circumvent the ten-day notice requirement. Accordingly, respondent contends that claimant's request for workers compensation benefits should be denied because he failed to provide respondent with notice of the accident within ten days. Further, respondent asserts that claimant was terminated from his employment at respondent for cause and, therefore, is not entitled to temporary total disability benefits in the event the authorized physician would take him off work.

In its Application for Review by the Appeals Board, respondent also raised an issue that the ALJ's decision did not address certain defenses raised at the preliminary hearing, such as whether claimant suffered injury arising out of and in the course of employment, whether timely notice was given, whether there was a timely written claim, and whether claimant may claim temporary total disability benefits after his termination for cause by respondent.

Claimant has not filed a brief in this appeal and, therefore, the Board does not have the benefit of claimant's arguments on the issues. Presumably, claimant would ask that the ALJ's order be affirmed.

The issues for the Board's review are:

(1) On an appeal from a preliminary hearing order, what is the Board's jurisdiction to review the issues raised by respondent?

(2) Did claimant suffer injuries that arose out of and in the course of his employment with respondent? If so, did claimant suffer an injury on a specific date or did he suffer a series of micro-traumas on or about May 2006 and each and every day worked thereafter through June 14, 2007?

(3) Did claimant provide respondent with timely notice?

(4) Did claimant serve respondent with timely written claim?

(5) Did the ALJ exceed his jurisdiction by awarding claimant temporary total disability compensation if taken off work by the authorized treating physician?

FINDINGS OF FACT

Claimant began working as a delivery driver for respondent on February 14, 2006. His job required him to pick up and deliver radioactive isotopes in containers to hospitals. The containers weighed from 15 to 60 pounds. In order to pick up a container, he would bend over to a 45 degree angle and extend his arm to the middle of his vehicle to get to the container. He would have to lift the container almost straight up, which placed him in an awkward position and forced him to lift using his shoulders and arms instead of his hips

and legs. On May 1, 2006, while making his first delivery of the day, he bent over in his vehicle at a 45 degree angle and lifted a container. He suddenly experienced a pain in his right arm at the elbow that extended down to just above the wrist. When claimant returned to respondent's facility, he told Steve, what had happened. Claimant said that Steve was a dispatcher and manager of the drivers and was his immediate supervisor. Steve did not direct him to fill out an accident report.

The condition in claimant's arm got progressively worse from the extended lifting at work. The pain extended to other parts of his arm, shoulder and up close to his neck. Two weeks later, claimant again told Steve about his injury and pain. At that time, Steve told him to talk to the business manager, Kathy.

Claimant went to see his personal physician, Dr. Terry Summerhouse, on June 21, 2006. Dr. Summerhouse gave him some mild exercises and told him to use heat treatment, take Advil, and wear an arm band. Claimant wore the arm band to work, where it was noticed by John Woodward, the main manager of respondent, sometime in early July. Mr. Woodward asked about it, and claimant told him about the incident on May 1. Mr. Woodward told claimant to go to Kathy and tell her about it. Claimant returned to Kathy. Claimant did not fill out any paperwork when he talked to Steve, Kathy or Mr. Woodward.

Claimant continued to do the same type of lifting at work. He continued to see Dr. Summerhouse for problems with his right elbow and also his left elbow, which also started to bother him. The pain in his right elbow extended down both sides of the arm and progressively got worse to the wrist. He had numbness in his hand and a couple of fingers. He had a clicking noise in his right shoulder and a pinching sensation up near his neck. When he saw Dr. Summerhouse on June 14, 2007, and complained about his problems, Dr. Summerhouse told him that if he continued working at respondent and lifting the containers, he would eventually wind up having surgery. Dr. Summerhouse recommended claimant quit his job.

Claimant returned to work on June 14 and tried to speak with Andrea Puyear, respondent's new manager. However, Ms. Puyear either was not in or was busy, so he did not see her that day. He returned to work on June 15 and told Ms. Puyear about his visits to Dr. Summerhouse and gave Ms. Puyear the note from Dr. Summerhouse saying he needed to quit his job. Ms. Puyear then fired him for making some mistakes in his delivery route.

Claimant admits he made two misdeliveries during the time he worked for respondent. He made a mistake in 2007 but could not remember the date. He also admits that at times he would take an unapproved route when he came upon road construction.

Ms. Puyear, who is the pharmacy manager for respondent, testified that she is a pharmacist but also oversees the pharmacists and delivery drivers. She said when

someone is hired at respondent, they are provided a handbook that has a section on workers compensation in it. The handbook sets out the procedure of reporting an injury. She said that injuries were to be reported to the pharmacy manager or the pharmacist on duty if the pharmacy manager is not in the building. The manager fills out a workers compensation claim by way of a computer program. This claim is sent to the corporate office, and after a day or two, someone from the corporate office calls to follow up. Ms. Puyear testified that there was no report of injury in claimant's personnel file.

There is a sign concerning workers compensation posted in the breakdown area where claimant would break down his return cans. Ms. Puyear admitted she has not read the sign and does not know what it says.

Ms. Puyear stated that on June 14, 2007, claimant had misdelivered an emergency care dose. The customer was not able to reach claimant, so she had to reroute another driver to make the delivery. Claimant had made a previous misdelivery two weeks earlier. She called the corporate office and was told to send claimant home when he returned to the pharmacy. When claimant returned, she told him he had made a misdelivery that morning and that he needed to go home. Later, Ms. Puyear heard back from corporate with the message that she should terminate claimant, and she called his home and left a message on his voice mail asking him to come in the next day at 6 a.m.

When claimant came in the next day, she told him he was being terminated because of the misdeliveries, as well as because of the other write-ups in his file that included taking too long to make his deliveries and getting too much overtime, not taking the prescribed routes, and bullying another employee. When she told claimant he was terminated, he did not say anything but just reached into his pocket and pulled out an envelope and threw it down on her desk. It was a letter from his doctor dated June 14, 2007, and it indicated that Dr. Summerhouse recommended that claimant end his job at respondent. Ms. Puyear stated that respondent has light duty available for employees who need light duty work. But for claimant's termination, she would have provided him with light duty work.

Ms. Puyear stated that in May 2006, respondent employed a dispatcher named "Steve." Dispatchers usually help sort out doses and put them in delivery cans. They also coordinate the routes and organize the cans for the drivers. However, a dispatcher is not a supervisor. They do not hire, fire or counsel employees. Ms. Puyear also stated that in May 2006, a person named Kathy worked for respondent as an administrative assistant. Kathy did not have a supervisory position.

In May 2006, John Woodward was manager of respondent and was claimant's supervisor. He now works for respondent on a part-time basis. Mr. Woodward said that claimant never reported an injury on the job to him. If claimant had reported an injury, Mr. Woodward would have immediately contacted the human resources office for guidance on procedure. Mr. Woodward did not recall ever seeing claimant with an arm band. He does

not remember ever talking to claimant about the arm band. He reiterated Ms. Puyear's testimony that Steve was a dispatcher, and Kathy was the office administrator.

Mr. Woodward acknowledged that Steve had specific supervisory authority for certain job functions. Mr. Woodward said that dispatchers make out the assignments for the drivers in conjunction with the opening pharmacist. Routes are primarily set, and the dispatcher would oversee an exception and make sure the drivers were on task. If a driver called in sick, the opening pharmacist would be responsible for reassigning the routes. However, Steve had the authority to change people from different routes. He could give some direction to the drivers.

Mr. Woodward said there were signs posted at work that read all work-related injury should be immediately reported to the employee's supervisor. Mr. Woodward agreed that he delegated authority to people. Kathy, the office administrator, was authorized to make sure employees went through the training procedure and received orientation materials for the company. Drivers could contact the dispatcher with questions about the route or to find out what routes they were going to be driving that day. The dispatcher had the authority to tell the drivers which route they were going to take. Mr. Woodward agreed that the dispatcher had some sort of supervisory power over the drivers. If an employee wanted to take a day off work, he or she would ask Mr. Woodward. If an employee was calling in sick, they would speak with the pharmacist on duty. A dispatcher did not have authority on how the office ran but was limited to helping the opening pharmacist.

Issue No. 1: On an appeal from a preliminary hearing order, what is the Board's jurisdiction to review the issues raised by respondent?

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or

> temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[1] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[2]

ANALYSIS AND CONCLUSION

The issues numbered 2, 3 and 4 raised by respondent are deemed jurisdictional by K.S.A. 44-534a. Date of accident is not a jurisdictional issue except as may be necessary to determine the other issues. The Board has jurisdiction of issue No. 5 because it is alleged the ALJ exceeded his jurisdiction.

Issue No. 2: Did claimant suffer injuries that arose out of and in the course of his employment with respondent? If so, did claimant suffer an injury on a specific date or did he suffer a series of micro-traumas on or about May 2006 and each and every day worked thereafter through June 14, 2007?

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3]

---

[1] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[2] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[3] K.S.A. 2006 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

ANALYSIS AND CONCLUSION

Claimant testified he was making deliveries on May 1, 2006, when he injured his right arm lifting a container. Claimant's description of this accident is supported by his testimony that when he returned to respondent's facility, claimant told Steve about his injury. Steve did not testify at the preliminary hearing. It is also supported by the accident description claimant gave to Drs. Summerhouse and Murati. There is no evidence that contradicts claimant's version of the events on May 1, 2006. This Board Member finds claimant suffered personal injury by an accident on May 1, 2006, that arose out of and in the course of his employment with respondent.

The next issue is whether claimant suffered a series of aggravations and/or micro traumas each working day through June 14, 2007. Claimant testified that his arm got progressively worse. He spoke with Steve again about the problem and was told to speak with Kathy. He said he spoke to Kathy, who purportedly told him that such injuries were not unusual. He did not say that he asked either Steve or Kathy for authorized medical treatment. Instead, he went on his own to Dr. Summerhouse on June 21, 2006. Dr. Summerhouse does not specifically address the issue of a series of accidents or work-related aggravations, but claimant returned to Dr. Summerhouse on several occasions during his employment. Dr. Summerhouse states in his report that he diagnosed claimant with "tennis elbow and the pain is aggravated by dorsiflexion (arm/hand movement away

---

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

from the joint) and supination (turning the palm forward)."[6] Dr. Summerhouse eventually recommended that claimant leave his delivery job because the "elbow needs continuous rest if the injury is to heal. Repetitive lifting of these heavy containers at an apparent unsafe body angle could worsen his condition and require surgical intervention. Therefore, I am recommending that Mr. Bryan leave his delivery job."[7] Dr. Summerhouse apparently believed that claimant's work activities were aggravating his condition.

Dr. Murati specifically described a series of accidents or mini traumas: "This claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on or about May 2006 and every day worked thereafter through 06-14-07 during his employment with Cardinal Health."[8] He also recommended work restrictions "to work as tolerated and to use common sense."[9]

There is no contrary expert medical opinion. Accordingly, this Board Member finds claimant suffered a series of accidents and aggravations each and every working day through his last day worked on June 14, 2007.

Issue No. 3: Did claimant provide respondent with timely notice as required in K.S.A. 44-520?

PRINCIPLES OF LAW

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as

---

[6] P.H. Trans., Cl. Ex. 2 at 1.

[7] *Id.* at 2.

[8] P.H. Trans., Cl. Ex. 1 at 3.

[9] *Id.*

provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS AND CONCLUSION

Claimant testified that he was never instructed as to whom he must report accidents. He gave notice of his May 1, 2006, accident that same day to an individual he believed to be his immediate supervisor. Moreover, there is no dispute but that claimant gave notice on June 15, 2007, the date he was terminated, which was within 10 days of the ending date of his series of accidents. Accordingly, notice was timely given.

Issue No. 4: Did claimant serve respondent with timely written claim?

PRINCIPLES OF LAW

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

ANALYSIS AND CONCLUSION

Contrary to respondent's allegation in its Application for Review, written claim was not raised as an issue at the preliminary hearing.

THE COURT: Miss Howard, what are the respondent's objections to the claimant's request?

MISS HOWARD: Your Honor, we are objecting and denying this claim because we believe there was no notice as to this injury. So we are denying that we should provide medical treatment or TTD if he is taken off of work.

THE COURT: Are you denying that the injury occurred or just timely notice?

MISS HOWARD: We are denying that the injury occurred.[10]

[10] P.H. Trans. (Aug. 14, 2007) at 5.

Nevertheless, as claimant filed his Form K-WC E-1 Application for Hearing on June 20, 2007, written claim was timely for a June 14, 2007, accident.

Issue No. 5: Did the ALJ exceed his jurisdiction by awarding claimant temporary total disability compensation if taken off work by the authorized treating physician?

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states in part:

> Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

Once the ALJ determined the claim was compensable, she had the authority to award claimant temporary total disability compensation. As such, the ALJ did not exceed her jurisdiction. On an application from a preliminary hearing order, the Board is without jurisdiction to determine whether a claimant is or is not temporarily totally disabled or if temporary total disability compensation should be awarded.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

---

[11] K.S.A. 44-534a.

[12] K.S.A. 2006 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 15, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

_____
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Heather A. Howard, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge